



**BILLING CODE: 4410-09-P**

**DEPARTMENT OF JUSTICE  
Drug Enforcement Administration**

**Docket No. 13-7  
Gary Alfred Shearer, M.D.  
Decision And Order**

On February 4, 2013, Administrative Law Judge (ALJ) Christopher B. McNeil issued the attached recommended decision. Neither party filed exceptions to the decision.

Having reviewed the record in its entirety, including the ALJ's recommended decision, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law,<sup>1</sup> and recommended Order.<sup>2</sup>

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<sup>1</sup> In opposing the Government's Motion for Summary Disposition, Respondent argues that the Kentucky Board of Medical Licensure's Order is based upon information provided by law enforcement which "is seriously flawed, misconstrued, unverified, unsupported, or simply, untrue." Resp. Reply to Govt's Mot. for Summ. Disp., at 2. Respondent raises a plethora of contentions, including that the conduct of the investigators "was highly prejudicial and, frankly, inept," *id.*; that the Board "cherry-picked" the charts its consultant reviewed and that the consultant's conclusion that Respondent "violated the standard of care was wrong—because there was no standard of care in Kentucky regarding what a physician should do in the face of inconsistent [urine drug screens] at the time these patients were being treated," *id.* at 4; and that the Board ignored the consultant's recommendations that his prescribing issues could be addressed by educating [him] about proper follow up." *Id.* at 8. He then concludes by arguing that "DEA created the case against [him] that led to his suspension[,] that "[t]he agency now wants to bootstrap the suspension it caused as a reason to revoke [his] license to write controls" [sic], and that the Board "most likely would never have suspended [his] medical license without the DEA's biased, unfairly prejudicial input." *Id.* at 26-27. As relief, Respondent seeks a hearing and a stay of the matter until after the Board's hearing.

The fact remains that the Board's Order of Emergency Suspension remains in effect, and "DEA has held repeatedly that a registrant cannot collaterally attack the result of a state criminal or administrative proceeding in a proceeding under section 304, 21 U.S.C. 824, of the CSA." *Zhiwei Lin*, 77 FR 18862, 18864 (2012) (citing cases). As I held in *Lin*, "Respondent's various challenges to the validity of the [Board's] Suspension Order must be litigated in the forums provided by the State," and his "contentions regarding the validity of the [Board's] Suspension Order are therefore not material to this Agency's resolution of whether he is entitled to maintain his DEA registration in" Kentucky. *Id.* As explained by the ALJ, because Respondent no longer meets the CSA's threshold requirement for holding a practitioner's registration, *see* U.S.C. 802(21) and 823(f), he is not entitled to maintain his registration and I decline his request to stay the matter until the State concludes its proceeding.

<sup>2</sup> While the ALJ "order[ed] that this case be forwarded to the Deputy Assistant Administrator for final disposition," Order Granting Govt's Motion for Summ. Disp., at 9; under Department of Justice regulations, that official has not been delegated the authority to issue "final orders in connection with [the] suspension, denial or revocation of [a] registration." 28 CFR 0.104, Appendix to Subpart R of Part 0, § 7.

## **ORDER**

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration AS6213172, issued to Gary Alfred Shearer, M.D., be, and it hereby is, revoked. I further order that any pending application of Gary Alfred Shearer, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.<sup>3</sup>

Dated: March 21, 2013

Michele M. Leonhart  
Administrator

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<sup>3</sup> Based on the findings set forth by the Kentucky Board of Medical Licensure in the Emergency Order of Suspension, I conclude that the public interest necessitates that this Order be effective immediately. See 21 CFR 1316.67.

Anthony Yim, Esq., for the Government  
Robert T. Core, Esq., for the Respondent

**RECOMMENDED RULING, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**Procedural History**

Christopher B. McNeil, Administrative Law Judge. On November 28, 2012, the Deputy Administrator of the Drug Enforcement Administration, Office of Diversion Control, filed an Order to Show Cause proposing to revoke the DEA Certificate of Registration, Number AS6213172, issued to Gary Alfred Shearer, M.D. (“Respondent”), pursuant to 21 U.S.C. 824(a)(3),(4) and 21 U.S.C. 823(f). As grounds for revocation, the Government alleges that Respondent is “without authority to handle controlled substances in the State of Kentucky.”<sup>1</sup>

On December 26, 2012, Respondent, through counsel, filed a timely request for hearing. Respondent does not dispute that his state license was suspended by the Kentucky Board of Medical Licensure. He argues, however, that the suspension was imposed “without any due process hearing” and “is temporary in nature and is not permanent.”<sup>2</sup>

On January 2, 2013, the Government was ordered to provide evidence to support the allegation that Respondent lacks state authority to handle controlled substances. Its Motion for Summary Disposition was received on January 8, 2013, with proof of service upon the Respondent. Accompanying the Motion was an affidavit by Stephanie Burkhardt, dated January 3, 2013, and a photocopy of a document entitled “Emergency Order of Suspension,” appearing to be filed on September 24, 2012, with the Commonwealth of Kentucky Board of Medical Licensure. This Order states that the Board suspended the medical license it issued to the Respondent, Gary A. Shearer, M.D., effective upon the Respondent’s receipt of the Order.

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<sup>1</sup> Order to Show Cause Nov. 28, 2012 at 1.

<sup>2</sup> Request for Hearing Dec. 26, 2012 at 1.

In my Order dated January 2, 2013, I provided to Respondent the opportunity to respond to the Government's Motion for Summary Disposition. I received that response on January 22, 2013. In his Reply to the Government's Motion for Summary Disposition, Respondent, through counsel, requests that I overrule the Government's motion, that a hearing be held prior to the disposition of this administrative charge, that these proceedings be held in abeyance until at least May 7, 2013, at which time Respondent anticipates presenting evidence to the Kentucky Medical Board, and that he be given an opportunity "to prove that he has violated no law and adhered to the standards of care of his profession."<sup>3</sup>

Accompanying the Respondent's Reply was a compact disk, the contents of which were described within the Reply. Summarized, the contents include records that Respondent avers are relevant to his assertion that he has violated no law and has adhered to the standards of care of his profession. I have not read all of the pages contained on the disk. I have, however, examined portions of the 7,000 or so pages contained therein. Coupled with the factual and legal premises Respondent's counsel presented in his Reply, I believe I have a sufficient understanding of the contents of the disk to proceed. (For reasons set forth below, the disk has not been admitted as an exhibit, nor are its contents evidence in this proceeding. The disk remains in the record strictly as a proffer.)

Contained on the disk are medical records reflecting treatment provided by Respondent and other medical professionals. The records provide information about the treatment of patients whose circumstances were examined by the Kentucky Medical Board. In his Reply brief, Respondent states that the Motion for Summary Disposition now before me is based on the judgment of the Kentucky Medical Board, but that the Board's judgment was not predicated on evidence gathered during a Board hearing, and that in fact Respondent has not yet been permitted

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<sup>3</sup> Reply to the Government's Motion for Summary Disposition Jan. 22, 2013 at 1.

to present evidence to that Board. He stated he expects to make such a presentation during a due process hearing currently scheduled to take place before the Kentucky Medical Board on May 7, 8, and 9, 2013.<sup>4</sup>

### **Issue**

The substantial issue raised by Respondent concerns this set of circumstances. Respondent correctly contends that the Government's Motion for Summary Disposition is based on the determination by the Kentucky Medical Board that his license to practice medicine in the Commonwealth should be suspended. He states that he currently is not practicing medicine and is not prescribing any controlled substances. He states that because of the temporary suspension of his license, his medical practice is now idled.<sup>5</sup>

Beyond his contention that the Medical Board's action has been taken without the opportunity to present evidence or respond to the same, Respondent makes a pointed claim regarding the role of the United States Department of Justice and the Drug Enforcement Administration. Respondent contends that the Medical Board's action is predicated wholly on action by investigators of the Drug Enforcement Administration, averring that "the suspension was imposed by the Board because of information furnished to it by Diversion and Task Force Investigators of the DEA."<sup>6</sup> He then asserts that DEA Diversion personnel "approached the [Medical Board] and loaded the [B]oard up with misinformation []." <sup>7</sup> He contends that "much of the alleged information the DEA Diversion Investigators provided the [Medical Board] is seriously flawed, misconstrued, unverified, unsupported, or, simply, untrue."<sup>8</sup> According to Respondent, the evidence presented to the Medical Board "was highly prejudicial and, frankly,

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<sup>4</sup> Id.

<sup>5</sup> Id. at 1-2.

<sup>6</sup> Id. at 2.

<sup>7</sup> Id.

<sup>8</sup> Id.

inept.”<sup>9</sup> The sum and substance of this feature of Respondent’s Reply is that the Diversion investigators “ought not be permitted to engineer a state licensure suspension, then bootstrap that questionable conduct into a DEA summary revocation.”<sup>10</sup>

### **The Respondent’s Contentions**

There are thus two legal bases upon which Respondent relies in his argument against summary disposition. First, he challenges the propriety of the Kentucky Medical Board’s decision to summarily suspend his medical license without first giving him the opportunity to confront evidence against him and introduce evidence in support of his own cause. Second, he challenges the propriety (and the fairness) of conditions that permit the DEA to force the revocation of his DEA Certificate without ever having the opportunity to present evidence in his own behalf and without the chance to challenge evidence that has been presented against him.

Missing from the otherwise thorough iteration of his premises is any reference to authority, legal or otherwise, that would permit me to enter into the weighing of the evidence Respondent has presented in this Reply. The scope and focus of the proceedings now before me are relatively concrete and highly circumscribed. They also are accurately set forth by the Government in its Motion for Summary Disposition, an analysis I am endorsing here.

### **Scope of Authority**

The case before me is presented under a grant of authority to either suspend or revoke a registration “upon a finding” that a registrant “has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.”<sup>11</sup> My authority in this case arises because the DEA has jurisdiction over, and can register, “practitioners.” Federal statutory authority

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> 21 U.S.C. 824(a)(3).

describes a “practitioner” as “a physician . . . or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . . to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice . . . .”<sup>12</sup> In addition, Congress provided that the Attorney General, through the DEA’s Administrator, “shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.”<sup>13</sup> These two provisions are internally consistent and are unambiguous. They also support the core premise set forth in the Government’s Motion: that upon suspension or revocation of his medical license in Kentucky, Respondent no longer meets the statutory definition of a “practitioner,” which is a mandatory condition to continuing as a Registrant.<sup>14</sup> This construction of statutory authority has been endorsed and applied by the Administration and by courts on appeal.<sup>15</sup>

### **Facts**

Given this body of law, the material fact here, indeed the sole fact of consequence, is whether the Kentucky Medical Board has suspended Respondent’s medical license. Where, as here, no material fact is in dispute, there is no need for an evidentiary hearing and summary disposition is appropriate.<sup>16</sup> The sole question of fact before me can be addressed, and has been addressed, by stipulation. Our record includes a declaration under penalty of perjury<sup>17</sup> by Stephanie Burkhardt.<sup>18</sup> Ms. Burkhardt is the Lead Diversion Investigator associated with this case. In her declaration, Ms. Burkhardt avers that the Kentucky Medical Board suspended Respondent’s

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<sup>12</sup> 21 U.S.C. 802(21).

<sup>13</sup> 21 U.S.C. 823(f).

<sup>14</sup> Government’s Motion for Summary Disposition Jan. 8, 2013 at 4.

<sup>15</sup> See Id.

<sup>16</sup> See Michael G. Dolin, M.D., 65 FR 5661 (2000); see also Philip E. Kirk, M.D., 48 FR 32887 (1983), aff’d sub nom. Kirk v. Mullen, 749 F.2d 297 (6th Cir. 1984).

<sup>17</sup> See 28 U.S.C. 1746.

<sup>18</sup> Government’s Motion for Summary Disposition Jan. 8, 2013 at Appendix A.

medical license on September 24, 2012.<sup>19</sup> She further states that this license is currently suspended, and that Respondent is not authorized to prescribe or dispense controlled substances in the Commonwealth.<sup>20</sup> (Although I note that, while the Government attributes Board action to that of the Florida Department of Health,<sup>21</sup> its citation to Appendix B establishes that such action was by the Board in Kentucky, not Florida.)

Also accompanying the Government's Motion is a photocopy of the Commonwealth's Emergency Order of Suspension issued by Board of Medical Licensure.<sup>22</sup> This document appears to confirm the factual contentions presented in D.I. Burkhart's Declaration, in that it declares it to be an Emergency Order and orders the suspension of Respondent's medical license, effective "upon receipt by the licensee."<sup>23</sup> There is a certificate of service accompanying the Board's Order, indicating that a copy was sent by certified mail on September 24, 2012.

In order to establish the factual predicate necessary to determine this issue, I issued a procedural order dated January 23, 2013, directing the Respondent to indicate whether the following four facts are in dispute:

1. Respondent is registered with the Drug Enforcement Administration as a practitioner in Schedules II through V pursuant to DEA registration AS6213172, with a registered location of 7210 Turfway Road, Suite B, Florence, Kentucky 41042. This registration expires by its terms on February 28, 2015.
2. On September 24, 2012, the Kentucky Board of Medical Licensure, in case number 1433, issued an Emergency Order of Suspension, suspending the Respondent's license to practice medicine and prescribe controlled substances in Kentucky.
3. The Order of Suspension described above is admitted as ALJ Exhibit 1.
4. The Order of Suspension is currently in effect, and has been in effect continuously since the date Dr. Shearer received a copy of that Order.

On January 31, 2013, I received Respondent's Response to this procedural order, in

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<sup>19</sup> Id. at 1.

<sup>20</sup> Id.

<sup>21</sup> Id. at 2.

<sup>22</sup> Id. at Appendix B.

<sup>23</sup> Id. at 13-14.



which he stipulated to these four statements as being true. Also noted in the procedural order was the fact that the record did not establish when the Kentucky Board's Emergency Order of Suspension was received by Respondent. The evidence otherwise establishes that, indeed, Respondent has received the Board's Order, and receipt is deemed to have been effective as of September 28, 2012.

### **Analysis**

In determining whether to grant the Government's motion for summary disposition, I am required to apply the principle of law that holds such a motion may be granted in an administrative proceeding if no material question of fact exists:

It is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory - even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks (citations omitted).<sup>24</sup>

In this context, I am further guided by prior decisions before the DEA involving certificate holders whose state medical licenses have been revoked or suspended. On the issue of whether an evidentiary hearing is required, "it is well settled that when there is no question of material fact involved, there is no need for a plenary, administrative hearing."<sup>25</sup> Under this guidance, the Government's motion must be sustained unless a material fact question has been presented.

The Government argues that the sole determinative fact now before me is that Respondent's medical license has been suspended by the Kentucky Medical Board. I agree. In order for a medical doctor to be authorized to administer controlled substances, he or she must

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<sup>24</sup> NLRB v. International Assoc. of Bridge, 549 F.2d 634, 638 (9th Cir. 1977) (quoting United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 453 (9th Cir. 1971)).

<sup>25</sup> See Michael G. Dolin, M.D., 65 FR 5661 (2000); Jesus R. Juarez, M.D., 62 FR 14945 (1997); see also Philip E. Kirk, M.D., 48 FR 32887 (1983), aff'd sub nom. Kirk v. Mullen, 749 F.2d 297 (6th Cir. 1984).

meet the definition of “practitioner” as found in the Controlled Substances Act.<sup>26</sup> Such a person must be “licensed, registered, or otherwise permitted by . . . the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice.”<sup>27</sup> Delegating to the Attorney General the authority to determine who may or may not be registered to perform these duties, Congress permitted such registration only “if the applicant is authorized to dispense . . . controlled substances under the laws of the state in which he practices.”<sup>28</sup>

These two sources of authority complement the provision that is triggered when a registrant loses his or her state license to practice: where, as here, a registrant “has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances,”<sup>29</sup> the registrant is no longer entitled to registration by the DEA. As cited by the Government in its Motion for Summary Disposition, there is substantial authority both through agency precedent and through decisions of courts in review of that precedent, holding that a petitioner’s DEA registration is dependent upon his or her license to practice medicine.<sup>30</sup> Under the doctrine before me, the Government meets its burden of establishing grounds to revoke a registration upon sufficient proof establishing the registrant’s medical license has been suspended or revoked. That proof is in the record before me, and it warrants the summary revocation of Respondent’s DEA certificate.

I am mindful of the arguments raised by Respondent in his Reply to the Government’s Motion for Summary Disposition. At the outset, Respondent noted that he has not yet had an

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<sup>26</sup> 21 U.S.C. 802(21).

<sup>27</sup> Id.

<sup>28</sup> 21 U.S.C. 823(f).

<sup>29</sup> 21 U.S.C. 824(a)(3).

<sup>30</sup> Government’s Motion for Summary Disposition Jan. 8, 2013 at 4, and cases cited therein.

opportunity to present evidence to the Kentucky Medical Board, and urges that action by the DEA to revoke his registration wait until that process has run its course.<sup>31</sup> Emphasizing the temporary nature of the Medical Board's emergency order, Respondent asserts that the Board acted on the basis of evidence which, according to Respondent, is of questionable weight.<sup>32</sup> Beyond the concerns raised about not having been permitted to challenge this evidence and about the accuracy or sufficiency of the evidence, Respondent criticizes the DEA investigation and complains about its undue influence on the Medical Board, all occurring without benefit of a hearing.<sup>33</sup>

Some care should be taken to assure the parties that the actions taken in this administrative proceeding conform to constitutional requirements. Although he cites no authority in support of his claim, I have examined the parties' contentions with an eye towards ensuring all tenets of due process have been adhered to. There is, however, no authority for me to evaluate the facts that underlie Respondent's contentions. Those contentions are summarized in his Reply to the Government's Motion for Summary Disposition. These generally describe his meritorious service as a physician and the extenuating circumstances that may have led to adverse outcomes for some of his patients.<sup>34</sup> While the details of these circumstances may well be of interest to the Kentucky Medical Board, the facts or allegations presented in his Reply are not material in the administrative proceedings now before the DEA. In the proceedings now before me, the only material question is answered by the stipulation that establishes the suspension of Respondent's license. Further, and as is sufficiently set forth in the Government's Motion for Summary Disposition, revocation of the DEA certificate is warranted "even where a practitioner's state authority has been summarily suspended and the State has yet to provide the practitioner with a

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<sup>31</sup> Reply to the Government's Motion for Summary Disposition Jan. 22, 2013 at 1.

<sup>32</sup> Id. at 2.

<sup>33</sup> Id.

<sup>34</sup> Id. at 3-9 and 10-17.

hearing to challenge the State's action at which he may ultimately prevail."<sup>35</sup>

**Conclusion, Order, and Recommendation**

I find there is no genuine dispute regarding the action taken by the Kentucky Medical Board, and that because of that action the Respondent's medical license in Kentucky has been and remains suspended. I find no other material facts at issue, for the reasons set forth in the Government's Motion for Summary Disposition. Accordingly, I **GRANT** the Government's Motion for Summary Disposition.

Upon this finding, I **ORDER** that this case be forwarded to the Deputy Assistant Administrator for final disposition. I **RECOMMEND** the Respondent's DEA Certificate of Registration, Number AS6213172, be revoked.

February 4, 2013

s/ CHRISTOPHER B. MCNEIL  
Administrative Law Judge

[FR Doc. 2013-07194 Filed 03/27/2013 at 8:45 am; Publication Date: 03/28/2013]

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<sup>35</sup> Government's Motion for Summary Disposition Jan. 8, 2013 at 4 (quoting Kamal Tiwari, M.D., 76 FR 71604, 71606 (2011)).